Supreme Court, U.S.
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No. 00-1304

In the Supreme Court of the United States

THE KROGER CO.,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

"[I]t is well established," this Court has written, "that the parties' 'practice, usage and custom' is of significance in interpreting their [collective bargaining] agreement." *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 299, 311 (1989). Yet the Seventh Circuit thought the parties' consistent 14-year practice, usage, and custom under a CBA, as ratified through the CBA arbitration mechanism (see CBA § 32), to be of no significance in determining the scope of an employer's obligation to make pension contributions pursuant to the CBA. The only justification advanced for such a contradiction of this Court's instructions is Section 515 of ERISA, yet that statute says only that employers must make pension contributions "in accordance with the terms and conditions of" the governing CBA. To interpret ERISA in that manner is wrong, and creates a circuit split that this Court should resolve.

Respondents attempt to wish away the conflict exacerbated by the decision below. They argue that the Seventh Circuit is much more receptive to extrinsic evidence than the petition suggests; assert that the Third Circuit is much more hostile toward such evidence than our discussion suggests; and ignore the Sixth Circuit cases cited in the petition. Respondents further attempt to mislead this Court about the record in this case, arguing that the fund did not "know" of a practice that was disclosed to the fund in a report every month for 14 years and stating – in a falsehood contradicted by the very excerpts that respondents themselves attach to their brief in opposition – that petitioner did not raise in the Seventh Circuit the argument it raises here. These and respondents' other diversionary tactics should not stand in the way of this Court's resolution of an important circuit conflict and correction of an erroneous decision with highly disturbing policy implications.

1. As we explained (Pet. 15 & n.3), the decision below is part of a line of cases in which the Seventh Circuit, over several dissents, has held that extrinsic evidence may not be used in Section 515 actions to show ambiguity in CBA terms that are not facially ambiguous. Respondent Central States was a plaintiff in many of the Seventh Circuit cases applying the rule. See, *e.g.*, *Central States, S.E. & S.W. Areas Pension Fund* v. *Joe*

McClelland, Inc., 23 F.3d 1256, 1259 (7th Cir. 1994) ("extrinsic evidence may not be used to create an ambiguity in a pension or welfare agreement subject to ERISA"); *Central States, S.E. & S.W. Areas Pension Fund* v. *Central Cartage Co.*, 69 F.3d 1312, 1315 (7th Cir. 1995) (multi-employer pension agreements are not "normal two-party contract[s] for which evidence of idiosyncratic meaning may be used to depart from the objective meaning of the words"); *Central States, S.E. & S.W. Areas Pension Fund* v. *Gerber Truck Serv., Inc.*, 870 F.2d 1148 (7th Cir. 1989) (en banc). The Seventh Circuit's rule stands in direct conflict with the approach of the Third Circuit, which permits the use of extrinsic evidence to show that CBA provisions are ambiguous despite the absence of any obvious ambiguity. See *Teamsters Indus. Employees Welfare Fund* v. *Rolls-Royce Motor Cars, Inc.*, 989 F.2d 132 (3d Cir. 1993) (using parties' course of conduct to conclude that "each employee" was an ambiguous term that really meant "each regular employee").[1]

Respondents' reluctance to admit what the court below actually held is understandable, because the Seventh Circuit's extrinsic evidence rule is so plainly inconsistent with the approaches of the Third and Sixth Circuits and the text of Section 515, and because the adverse consequences of the holding are so serious for all companies that employ unionized labor. Consequently, respondents have conjured up a new version of what the Seventh Circuit held. They claim that the court of appeals did not consider petitioner's extrinsic evidence regarding the meaning of the CBA term "casual" employee because petitioner never argued that the term was ambiguous. In

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[1] According to respondents, the Third Circuit's approach to the use of extrinsic evidence in Section 515 cases is more restrictive than the petition suggests. Br. in Opp. 18-21. Respondents say that the Third Circuit will receive extrinsic evidence only for the "very limited purpose of illuminating the context of the [CBA]," provided the "focus remains on the [CBA] language selected by the parties." *Id.* at 19. In no circumstances, they submit, may the extrinsic evidence be used to contradict the language of the CBA. *Ibid.* Whatever semantic game respondents are attempting to play with those assertions, it remains impossible to conclude that the key term at issue in this case – "casual" employees – is ***less*** ambiguous than the term at issue in *Rolls Royce*, "each employee." Respondents never once acknowledge the actual, facially unambiguous contract language that was construed in that case.

addition, respondents claim that extrinsic evidence was disallowed because the district court did not make a finding that the fund was actually aware of petitioner's and the union's 14-year practice of classifying new hires as casuals until they successfully bid for a regular position on the regular seniority list. They argue that the result would have been different if there was a factual finding that the parties' interpretation of the CBA had been "actually disclosed" to the fund. Br. in Opp. 10.

a. Respondents assert that petitioner did not argue below that the term "casual" employee was ambiguous. Br. in Opp. 7-9. The assertion is false. To be sure, early on, in their respective motions for summary judgment, both sides argued that the *entire* CBA was unambiguous. Pet. App. 50a ("Neither [party] argues before this court that the CBA is ambiguous; they agree that it is unambiguous but disagree as to its interpretation."). But, as respondents grudgingly acknowledge (at Br. in Opp. 8), the Seventh Circuit held otherwise. Pet. App. 51a (holding, in light of ambiguities in the CBA, the "district court should not have treated the CBA as unambiguous and should not have declared its meaning as a matter of law on summary judgment").

Respondents urge that the only ambiguity of concern to the court of appeals was the meaning of the term "part-time" employee, and that the remainder of the CBA, including the term "casual" employee, was not found to be ambiguous. The first opinion of the court of appeals shows how spurious that claim is. The court stated several times that the entire CBA was ambiguous, not merely the term "part-time." Pet. App. 50a-51a. The ambiguities became apparent when the court attempted to harmonize references to "regular" and "casual" employees in the Master Agreement with references to "full-time" and "part-time" employees in the Local Supplement. To resolve these ambiguities, as respondents point out (at Br. in Opp. 8-9), the court was required to construe the term "part-time." But the critical issue on remand was whether the disputed contributions were due under the CBA, as it had been consistently interpreted by the parties to the CBA. Pet. App. 52a.

On remand, in compliance with the mandate of the court of appeals, petitioner and respondents introduced evidence to show how the term "casual" employee was understood by the parties to the CBA. It is disingenuous for respondents to suggest that

the meaning of "casual" employee was undisputed and therefore unambiguous. Petitioner demonstrated that the terms "casual" and "part-time" were synonymous and that, because neither group was included on the regular seniority list, neither was entitled to pension contributions. Pet. App. 32a, 34a-35a. Among other evidence, petitioner pointed to the decision of the Step 3 grievance committee, which determined that contributions were not required for the employees at issue under the longstanding interpretation of the CBA by petitioner and the union. In response, the fund argued that the employees at issue were not truly casuals but probationary employees for whom pension contributions were required. *Id.* at 39a-40a. As the Seventh Circuit recognized in its first opinion, "[w]hen parties suggest different, yet reasonable interpretations" of a contract provision, the provision is ambiguous. *Id.* at 50a. In the second appeal, petitioner argued that the entire CBA was ambiguous, and that "the Fund was fully aware of the ambiguity and of the extrinsic evidence of the parties' intent." Pet. C.A. Br. 17.[2]

b. Respondents urge that the Seventh Circuit's extrinsic evidence rule in Section 515 cases is less draconian than the petition suggests, and they ignore our discussion of the potential for misuse of this rule by pension and welfare funds. Br. in Opp. 10-14. According to respondents, the lower court's rule precludes only the use of extrinsic evidence that was not "actually disclosed" to the fund. *Id.* at 10. They tacitly concede that the Seventh Circuit has never permitted the introduction of extrinsic evidence in any reported Section 515 cases. Nevertheless, respondents hang their hat on dicta from prior decisions that, they claim, suggest that the Seventh Circuit

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[2] It is astounding that respondents would claim that petitioner did not make the same argument below as it does here, and simultaneously attach to the brief in opposition some of the very pages from the briefs below in which petitioner did make that argument. *E.g.*, Br. in Opp. App. 7a ("the CBA was ambiguous, * * * there was no secret side agreement, [and] the Fund knew of the ambiguity and was aware of the parties' interpretation of their mutual intent, as reflected, *inter alia*, in the Step 3 Grievance Committee decision"); *id.* at 9a n.24 ("Significantly, the same facts that support estoppel establish the non-existence of any purported 'secret side agreement' between Kroger and the Union. Furthermore, the information Kroger provided to the Fund (including the ambiguous CBAs) precludes the Fund from prevailing * * *.").

would set aside its extrinsic evidence rule if the proffering party could prove that the fund had been aware of the extrinsic evidence. *Id.* at 11 (speculating that proof of the fund's awareness "might make a difference" to the Seventh Circuit).[3] In this case, respondents submit, there was no express finding that the fund was actually aware of the longstanding interpretation of "casual" employee by petitioner and the union. Thus, respondents maintain that this is simply a case where the union and the employer had a secret oral side agreement, and that the exclusion of extrinsic evidence was proper and consistent with the approaches of other circuits, including the Third Circuit. These contentions are belied by the decisions below and by the record evidence.

First, the Seventh Circuit's two opinions in this case refute respondents' suggestion that the court's extrinsic evidence rule applies only to evidence that was concealed from the fund. In its first opinion, the court held unequivocally that "it is the plain text of the CBA upon which the Fund is entitled to rely," Pet. App. 49a. The court was equally clear in the second opinion, saying that Section 515 "allows pension funds to 'enforce the writings according to their terms.'" *Id.* at 11a (quoting *Gerber Truck.*, 870 F.2d at 1149). The court of appeals disregarded petitioner's extrinsic evidence that the fund knew of and acquiesced in petitioner's construction of the CBA for 14 years, holding that petitioner was bound by the court's interpretation of the term "casual" employee because that term was not obviously ambiguous. *Id.* at 13a, 17a-19a. Respondents are not free to displace that holding with their musing that irrefutable proof of the fund's acquiescence "might make a difference" to the Seventh Circuit. Br. in Opp. 11.

Second, respondents make too much of the absence of a specific finding in the district court's opinions that the fund received "actual disclosure" of the 14-year practice of classifying new hires as casuals pending their receipt of a regular posi-

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[3] Respondents argued exactly the opposite position in the district court, where they asserted that the Seventh Circuit's decisions in *Gerber Truck* and *Joe McClelland* foreclosed as a matter of law any defense based on the course of performance by the union and the employer. See, *e.g.*, Tr. 5-6.

tion on the regular seniority list. Br. in Opp. 12.[4] By "actual disclosure," respondents apparently mean a written notice under seal describing the interpretation of the CBA shared by the union, the employer, and the employees.[5] But petitioner provided the fund with copies of the CBAs and, beginning in or about 1975, sent the fund a monthly report identifying each employee's date of hire and the much later date on which petitioner began making pension contributions for the employee. Pet. App. 17a; see also C.A. Supp. App. 190-206.[6]

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[4] The absence of any findings below concerning petitioner's disclosures to the fund and respondents' knowledge of petitioner's and the union's course of conduct is an unfortunate consequence of the erroneous rule of the courts below – which petitioner asks this Court to review – that such disclosure and knowledge are ***irrelevant***. See Pet. App. 13a, 16a, 17a-18a. Nowhere is this clearer than in the estoppel section of the Seventh Circuit's second opinion. The court summarized but did not otherwise discuss petitioner's contention that the fund misrepresented to petitioner its acquiescence in the treatment of new employees as casuals, because the court relied on the CBA's language alone to conclude that petitioner "was in a better position than the fund to know the truth that its practice did not comport with the CBA." *Id.* at 18a.

[5] Alternatively, respondents seem to make the astounding assertion that, as long as they did not bother to ***read*** the notices petitioner sent them, they were entitled to the exact same treatment as a fund that did not ***receive*** any such notices. Br. in Opp. 13-14.

[6] Respondents admit that the fund received these reports, but assert that the reports did not begin until October 1987. Br. in Opp. 13. That is false. Petitioner's witness Stevens testified that she began sending the reports to Central States in 1974 or 1975. Tr. 566. The transcript pages that respondents cite in supposed contradiction of Stevens's testimony merely contain witness Evans's statement that she could not find any reports dated earlier than September 1987 in Cental States' files, but contain no discussion of Central States' record retention practices. Tr. 696-697. Respondents also try to mislead the Court by stating that only for a "minuscule portion" of the listed employees do the reports show a significant gap between the date of hire and the date on which contributions began. Br. in Opp. 13. The "minuscule portion" that respondents refer to comprises the total pool of casual employees for whom respondents have obtained retroactive contributions through this lawsuit.

The Kroger employee responsible for preparing these reports testified without contradiction that she made a notation on the reports when an employee was added to the regular seniority list (at which point contributions would commence for the employee). C.A. Supp. App. 195-196. Despite these regular communications reflecting the classification of new hires as casuals who were ineligible for pension contributions, and its continuous possession of the CBAs that the fund claims required contributions after 30 days of employment, the fund remained "silen[t] * * * over [a] long period of time," as the district court found. Pet. App. 24a.

Respondents' protestations that the fund did not have "actual disclosure" of the parties' interpretation of the CBA, Br. in Opp. 10, and that they were "[a]t most * * * negligent" in failing to object to that interpretation, *id.* at 12 (quoting Pet. App. 25a), do not advance their efforts to explain away the conflict between this case and *Rolls Royce*. In concluding that "the Funds' conduct also reflects their understanding that the [CBA] did not require payments for probationary employees," 989 F.2d at 137, the Third Circuit cited no special form of notice that put the funds on notice of the contracting parties' position. Rather, it was the five-year course of conduct ***itself***, together with the funds' failure to object, that the Third Circuit in *Rolls Royce* found dispositive. *Rolls Royce* was a stronger case for the disregard of extrinsic evidence because there was no indication there that the funds were receiving reports or other information from which they could discern the parties' interpretation of the CBA. Nevertheless, the Third Circuit held that funds have a fiduciary duty to "take steps to identify all participants and beneficiaries," and to "notify [ ] pensioner[s] of [their] employer's failure to contribute to the fund as required by the pension agreement." 989 F.2d at 137 (internal quotation marks omitted). Because the funds remained silent for five years about the employer's failure to make contributions for its probationary employees, the Third Circuit held that extrinsic evidence could establish the meaning of the term "each employee." *Id.* at 134-135. In the present case, the fund remained silent for 14 years, during which it received reports confirming that petitioner was not making the contributions to which the fund now claims entitlement.

The CBA in this case required pension contributions only for regular employees on the regular seniority list, but not for casual employees, a category describing employees who are "hired on a short-term basis" and "employed from time to time." Pet. App. 3a. Petitioner's extrinsic evidence – including not only the union's and fund's 14-year acquiescence in a course of performance but also the Step 3 Grievance Committee decision upholding petitioner's interpretation – was intended merely to establish what the company and the union agreed upon in the pension provision of the CBA.[7] They agreed that new hires would be classified as casuals until they secured a regular position on the regular seniority list, and that pension contributions would not be made until that transition occurred. See *id.* at 25a, 62a. For 14 years, petitioner made the contributions it understood were due under the CBA without objection from the union or the fund. Unlike the funds in *Rolls Royce*, respondents re-

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[7] Contrary to respondents' assertion (Br. in Opp. 20-21), course-of-performance evidence is exactly the sort of evidence that the common law of contracts allows to be used to show that a seemingly unambiguous contract term is in fact ambiguous. See RESTATEMENT (SECOND) OF CONTRACTS § 223 cmt. b (1981) ("There is no requirement that an agreement be ambiguous before a course of dealing can be shown * * *."), *quoted in Rolls Royce*, 989 F.2d at 135; see also Pet. 22-24 & n.7 (collecting additional authorities). If the Seventh Circuit's decision in *AM Int'l, Inc.* v. *Graphic Management Assocs., Inc.*, 44 F.3d 572 (1995), really stood for the proposition that "only evidence *provided by* disinterested third parties can be used to establish extrinsic ambiguity," as respondents claim (Br. in Opp. 20 (emphasis added)), then that would merely be another instance of irreconcilable conflict between the Seventh Circuit and *Rolls Royce*, but in fact the case says nothing of the kind. What Judge Posner said for the court in that case is that the evidence offered to show ambiguity in an apparently clear contract must be *the kind* of evidence that *can be* supplied by disinterested third parties because it is objectively verifiable – as both the course of performance and the Step 3 Grievance Committee decision in this case are – as opposed to the subjective testimony of the parties themselves as to what they believe the contract means. *Id.* at 575. This is not a case in which all the employer and the union have to offer is a "claim that they *really meant* the employees on the Peerless in Lake Michigan." Br. in Opp. 20 (emphasis added); cf. Pet. 20 (both discussing *Raffles* v. *Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864)). It is not the common law of contracts, but the Seventh Circuit's ***departure from*** that body of law in the name of Section 515, that explains the result below.

ceived monthly statements from petitioner showing a significant gap between the date of hire and the date on which contributions commenced. Whereas the funds in *Rolls Royce* remained silent over a five-year period, respondents' inaction spanned 14 years. There is simply no support for respondents' supposition that the Third Circuit, like the Seventh Circuit, would have rewarded their inattention with a million-dollar judgment.

c. As a final stratagem, respondents attempt to repackage this case as one raising some other issue of Section 515 law that would be resolved the same way under the precedents of the Third and Seventh Circuits. For example, they argue that the Third Circuit, like the court below, will allow a fund to enforce the written CBA even if it has some knowledge of inconsistent terms discussed by the parties during the negotiations leading up to the CBA. Br. in Opp. 15 (citing *Central Pa. Teamsters Pension Fund* v. *McCormick Dray Line, Inc.*, 85 F.3d 1098, 1103 (3d Cir. 1996)). But this case is not about what transpired during the collective bargaining negotiations between petitioner and the union. The question in this case is whether petitioner and the union agreed in the CBA that the disputed contributions would be made. Resolution of that question is dispositive because, as we explained (Pet. 19), Section 515 only requires employers to make those contributions promised in the CBA, and it does not allow funds to "enforce [] nonexistent contractual obligation[s]." *Rolls Royce*, 989 F.2d at 138.

Respondents also repeatedly attempt to frame this case as one involving an oral side agreement modifying the written CBA. Br. in Opp. 10-14, 18-19. That characterization is understandably more comfortable for respondents because every circuit that has considered the question has held that employers may not make pension promises in a CBA and then terminate the promised contributions through a subsequent side agreement with the union. But, again, this case is not about ***modifications*** of the pension provisions of a CBA. The question presented in this case is whether extrinsic evidence may be introduced in a Section 515 action to establish that pension provisions in the original CBA, as written, are ambiguous, and that the disputed

contributions are not required under the CBA as interpreted by the employer, the union, and the fund for more than 14 years.[8]

2. As we explained (Pet. 26-30), whether extrinsic evidence may be used to show ambiguity in CBAs subject to ERISA is an important issue that has arisen frequently since Section 515 was enacted more than 20 years ago. Unless this Court grants review, the lower court's rule will continue to expose employers to the risk of a surprise Section 515 award at the end of a collective bargaining term. This risk will "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements," *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am.* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962), as employers attempt to minimize their exposure by reducing their pension promises. Further review will avert those consequences by ensuring that employers are not saddled with pension obligations beyond those agreed to by the employer and the union in the CBA.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

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[8] The funds in *Rolls Royce* made the same argument as respondents here, and the answer should be the same (989 F.2d at 138 (citation omitted)):

> The Funds argue that as third party beneficiaries of the [CBA], they may enforce the agreement as written notwithstanding any oral modifications made by Rolls-Royce and the Union. While this is true, it is irrelevant. Rolls-Royce does not argue that the [CBA] created an obligation which an oral understanding or course of conduct extinguished. Rolls-Royce asserts that the written agreement never required it to make contributions for probationary employees. Rolls-Royce proffered evidence of the practice of the parties over the years to shed light on the contract parties' intention when they signed the ambiguous [CBA]. It did not proffer the evidence to demonstrate a subsequent modification of an existing responsibility.

Respectfully submitted,

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